

(29,027)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 477.

SAVAGE ARMS CORPORATION, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

| | Original. | Print. |
|--|-----------|--------|
| Petition | 1 | 1 |
| Exhibit A—Contract between Savage Arms Corporation and The United States..... | 7 | 5 |
| Exhibits B to H (inclusive)—Correspondence..... | 21 | 16 |
| General traverse..... | 28 | 21 |
| History of proceedings..... | 28 | 21 |
| Findings of fact..... | 29 | 21 |
| Conclusion of law..... | 35 | 29 |
| Opinion, Booth, J..... | 35 | 29 |
| Judgment | 41 | 34 |
| Application for and allowance of appeal..... | 41 | 35 |
| Clerk's certificate..... | 42 | 35 |

To

du
an
a t
ga

en
Ex
the
pa
a t
tic

2

ag
m
su
fo
fo

tic
up
It
sp
m
w
m
m

In the Court of Claims of the United States.

No. 34234.

SAVAGE ARMS CORPORATION, a Body Corporate,

VS.

UNITED STATES.

I. Petition and Exhibits.

Filed Dec. 8, 1919.

The Honorable Chief Justice and Associate Judges of the Court of Claims:

The claimant, Savage Arms Corporation, respectfully represents:

It is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Delaware, having its principal business office in the city of New York, and its factory in the city of Utica, in the State of New York, and is engaged in the business of manufacturing arms.

On or about April 30, 1918, the claimant and the United States entered into a contract, a copy of which is hereto annexed, marked Exhibit A, and made part hereof. In said contract it was agreed that the claimant should manufacture twenty-two (22) sets of base spare parts for Lewis machine guns, model of 1917 (Aviation Type), on the basis of 1,000 guns each, in accordance with drawings and specifications to be furnished by the Engineering Bureau, Ordnance Department, U. S. Army, and deliver the same to the United States in accordance with the schedule of quantities and deliveries set forth in said contract; and that among the spare parts so ordered to be manufactured and delivered were 440,000 magazines assembled, for which the United States agreed to pay the claimant the sum of \$4.24 each, plus a royalty of 9.28 per cent of the said price on the first 337,000 of said magazines, and a royalty of 4.64 per cent on the last 3,000 of said magazines.

The United States duly furnished the drawings and specifications as required by said contract, and the claimant promptly entered upon the performance thereof, and by the 29th day of January, 1919, had manufactured and delivered to the United States all of the spare parts called for by the said contract, except 142,000 of said magazines; and on the said 29th day of January, 1919, the claimant was ready, able, and willing to complete the manufacture of the 142,000 magazines, and to deliver the same in accordance with said contract.

4. On January 29, 1919, and after the signing of the armistice with Germany, the United States no longer having need for the spare parts, sent and delivered to claimant a letter signed by Major C. L. Sholes, Contracting Officer of the Ordnance Department for the United States Army, a copy of which is attached hereto as Exhibit A, and made a part hereof. In said letter the claimant was requested in the public interest immediately to suspend operations under its said contract with the United States to the extent of 298,000 magazines together with their spare parts. The claimant had in fact already manufactured and delivered to the United States under said contract 298,000 magazines, and there remained to be manufactured and delivered only 142,000 of said magazines. Claimant avers that the writer of said letter, Exhibit B, inadvertently requested the suspension of operations to the extent of 298,000 magazines, while intending to request such suspension to the extent of 142,000 magazines. On

September 12, 1919, Lt.-Col. R. H. Hawkins, of the Ordnance Department, United States Army, acting on behalf of the United States, addressed and sent to claimant a letter bearing that date, copy of which is attached hereto, marked Exhibit C, and made a part hereof. In this letter, by direction of the Chief of Ordnance, claimant was requested immediately to suspend further operations under its said contract, hereinbefore described, except such operations as might be necessary to complete delivery thereunder of total (including all deliveries theretofore made) of 298,000 magazines, together with their spare parts.

5. On September 24, 1919, the claimant by letter addressed to the said Lt.-Col. Hawkins, acknowledged the said suspension request of September 12, 1919, substituted for the incorrect suspension request of January 29, 1919, and in said letter notified the United States that claimant had suspended work in accordance with said request reserving, however, all its rights against the United States for failure of the Government to fully perform all the provisions of the contract hereinbefore mentioned, and especially its rights to recover all the profits which it would have made had it been permitted to completely perform the said contract. On the same date the claimant transmitted the letter last mentioned to the Secretary of the Rochester District Claims Board, and in its letter of transmittal stated that it was claimant's understanding that under paragraph 5 of Supply Circular No. 111 of the War Department, the War Department would not authorize or make any settlement of payment to a prime contractor on account of prospective profits, and requested the said Secretary to confirm this understanding, if it was correct. By letter of September 26, 1919, the Secretary of said Rochester District Claims Board informed claimant that its understanding of paragraph 5 of said Supply Circular No. 111 was correct. Copies of said letters of September 24, 1919, and September 26, 1919, are annexed hereto and made part hereof, and marked Exhibits D, E and F respectively.

6. On October 23, 1919, the claimant wrote the secretary of the Rochester District Claims Board that the claimant was, and signed

the making of the contract had been, willing and able to complete the entire quantity of 440,000 magazines specified in the said contract, and asked to be informed whether the Government proposed to take delivery of the suspended quantity of magazines under said contract. A copy of said letter marked Exhibit G is annexed hereto and made part hereof. On November 17, 1919, the said Lt.-Col. Hawkins, by direction of the Chief of Ordnance of the United States, and acting on behalf of the Government, advised the claimant, by letter of that date, that the United States would not accept or pay for 142,000 magazines remaining undelivered under the said contract, and that the Ordnance Department was not authorized to pay the claimant any anticipated profits on account of such undelivered articles. A copy of said letter, marked Exhibit H, is hereto annexed and made part hereof.

7. At and prior to the receipt of said letter of January 29, 1919, the claimant was engaged in the performance of the work to be done on its part under the said contract; it had provided itself with all necessary materials, equipment, and labor for the complete performance of the same, and was in every way ready, able, and willing to completely perform the same and to do all things which remained on its part to be done, and the claimant has at all times since the receipt of said suspension request of January 29, 1919, continued to be, and is now ready, able, and willing to completely perform the said contract; but from the said 29th day of January, 1919, claimant has been, and is now, prevented by the United States from completing the performance of said contract.

8. The actions of the Government of the United States as hereinbefore set forth amounted to a breach of said contract on the part of the United States without legal justification or excuse, and thereby the claimant suffered large damages, and thereby the claimant became, and is, entitled to recover of and from the United States all the profits which it would have made had it been permitted to completely perform the said contract. The said profits amount to three hundred and three thousand eight hundred and eighty dollars (\$303,880).

9. The claimant is the only person owning or interested in the claim above set forth, and no assignment or transfer of the same, or any part thereof, or interest therein, has been made. The claimant is justly entitled to receive and recover from the United States for and on account of the said damages the sum of three hundred and three thousand eight hundred and eighty dollars (\$303,880), after allowing all just credits and set-offs. The claimant has at all times borne true allegiance to the Government of the United States, and was not in any way aided, abetted, or given encouragement to rebellion against it. The claimant believes the facts as stated in this petition to be true.

Wherefore, the claimant prays judgment against the United States in the sum of three hundred and three thousand eight hundred and eighty dollars (\$303,880), and for such other relief as this Honorable Court might grant, both at law and in equity, in the premises.

SAVAGE ARMS CORPORATION,
By WILFRED L. WRIGHT,
President.

JESSE C. ADKINS,
Attorney for Claimant.

ANDERSON, ISELIN & ANDERSON,
Of Counsel.

6 STATE OF NEW YORK,
County of New York, as:

Wilfred L. Wright, being duly sworn, deposes and says that he is the President of the Savage Arms Corporation, the claimant in and which subscribed the foregoing petition; that he has read the same and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge and belief.

WILFRED L. WRIGHT.

Subscribed and sworn to before me this 6th day of December,
A. D. 1919.

[Notarial Seal]

ALICE C. MACCABEE,
Notary Public, Queens Co., No. 2524.

Certificate filed in New York Co., No. 518.

7

EXHIBIT A.

Purchase Order No. C. M. G. 48 A.

F.

Savage Arms Corporation

and

United States of America.

Ordnance Department,

U. S. Army.

Fixed Price Contract.

Spare Parts for 22,000 Lewis Machine Guns, Model of 1917.

Aviation Type.

Eighty Per Cent (80%) Clause.

Dated April —, 1918; Expires March 31, 1919.

Washington,

Government Printing Office,

1918.

8

These Articles of Agreement entered into this 30th day of April, 1918, by and between Savage Arms Corporation, a corporation organized and existing under and by virtue of the law of the State of Delaware and having its general office at 50 Church Street, New York, N. Y. (hereinafter called the Contractor), of the first part, and the United States of America, by Samuel McRoberts, Colonel, Ordnance Department, National Army, acting by direction of the Chief of Ordnance, United States Army, and under the authority of the Secretary of War, of the second part,

Witnesseth:

Whereas a state of war exists between the United States of America and the Imperial German and the Imperial and Royal Austro-Hungarian Governments and therefore the usual requirements of advertisements for proposals are dispensed with;

Now, therefore, under the laws of the United States in such cases made and provided and in consideration of the mutual agreements herein contained it is agreed that the Contractor shall manufacture twenty-two (22) sets of base spare parts for Lewis Machine guns, model of 1917 (Aviation Type), on a basis of 1,000 guns each, hereinafter called the articles, in accordance with drawings and specifications to be furnished by the Engineering Bureau, Ordnance Department, U. S. Army, and such changes therein as may be made as herein provided, and deliver the same f. o. b. cars at or near the point of manufacture, in accordance with the following schedule of quantities and deliveries:

| Quantity. | Name. | Septem-ber. | Octo-ber. | Novem-ber. | Decem-ber. | January. | February. | March. |
|-----------|--|-------------|-----------|------------|------------|----------|-----------|--------|
| 44,000 | Barrel | 730 | 1,200 | 1,300 | 7,740 | 10,800 | 11,700 | 10,530 |
| 22,000 | Barrel cleaning brush bristle | 365 | 600 | 650 | 3,870 | 5,400 | 5,850 | 5,265 |
| 22,000 | Barrel retaining nut | 365 | 600 | 650 | 3,870 | 5,400 | 5,850 | 5,265 |
| 22,000 | Bolt, complete | 365 | 600 | 650 | 3,870 | 5,400 | 5,850 | 5,265 |
| 2,750 | Butt latch | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 5,500 | Butt latch pin | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 5,500 | Butt latch spring | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 44,000 | Cartridge guide, assembled | 730 | 1,200 | 1,300 | 7,740 | 10,800 | 11,700 | 10,530 |
| 22,000 | Charging handle | 365 | 600 | 650 | 3,870 | 5,400 | 5,850 | 5,265 |
| 11,000 | Charging handle, extension | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |
| 5,500 | Combination cleaning rod steel | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 11,000 | Combination cleaning rod adaptor | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |
| 44,000 | Cylinder cleaning brush wire | 730 | 1,200 | 1,300 | 7,740 | 10,800 | 11,700 | 10,530 |
| 33,000 | Cylinder cleaning mop | 540 | 900 | 975 | 5,805 | 8,100 | 8,775 | 7,905 |
| 11,000 | Ejector | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |
| 5,500 | Ejector cover | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 88,000 | Extractor | 1,460 | 2,400 | 2,600 | 15,480 | 21,600 | 23,400 | 21,060 |
| 440 | Feed cover, not assembled | 5 | 10 | 10 | 80 | 110 | 120 | 105 |
| 2,750 | Feed operating arm | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 5,500 | Feed pawl | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 22,000 | Feed pawl spring | 365 | 600 | 650 | 3,870 | 5,400 | 5,850 | 5,265 |
| 2,750 | Front sight base | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 11,000 | Front sight base screw | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |
| 5,500 | Gas chamber | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 11,000 | Gas chamber gland | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |
| 11,000 | Gas regulator cup | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |
| 5,500 | Gas regulator key | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 5,500 | Gas Cylinder | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |

SAVAGE ARMS CORPORATION VS. THE UNITED STATES.

7

| | | | | | | | | |
|---------|--|-------|--------|--------|--------|---------|---------|---------|
| 2,750 | Gas cylinder casing..... | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 2,750 | Gear | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 1,386 | Gear casing..... | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 5,500 | Gear | 20 | 40 | 40 | 245 | 335 | 370 | 336 |
| 11,000 | Gear stop..... | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 11,000 | Gear stop pin..... | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |
| 440 | Gear stop spring..... | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |
| 2,750 | Guard, assembled..... | 5 | 10 | 10 | 80 | 110 | 120 | 105 |
| | Guard side piece (pairs only), including 2 rivets | | | | | | | |
| 2,750 | Locking piece..... | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 440,000 | Magazine, assembled..... | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 33,000 | Magazine grip box..... | 7,300 | 12,000 | 13,000 | 77,400 | 108,000 | 117,000 | 105,300 |
| 110,000 | Magazine grip box rivet..... | 540 | 900 | 975 | 5,805 | 8,100 | 8,775 | 7,905 |
| 33,000 | Magazine latch, assembled..... | 1,825 | 3,000 | 3,250 | 19,350 | 27,000 | 29,250 | 26,325 |
| 110,000 | Magazine latch spring..... | 540 | 900 | 975 | 5,805 | 8,100 | 8,775 | 7,905 |
| 110,000 | Magazine latch spring..... | 1,825 | 3,000 | 3,250 | 19,350 | 27,000 | 29,250 | 26,325 |
| 220,000 | Magazine strap and clip..... | 1,825 | 3,000 | 3,250 | 19,350 | 27,000 | 29,250 | 26,325 |
| 11,000 | Magazine strap rivet and washer..... | 3,650 | 6,000 | 6,500 | 38,700 | 54,000 | 58,500 | 52,650 |
| 440,000 | Magazine center..... | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |
| 33,000 | Magazine spacer rivet..... | 7,300 | 12,000 | 13,000 | 77,400 | 108,000 | 117,000 | 105,300 |
| 440,000 | Magazine top plate..... | 540 | 900 | 975 | 5,805 | 8,100 | 8,775 | 7,905 |
| | Magazine top plate rivet..... | 7,300 | 12,000 | 13,000 | 77,400 | 108,000 | 117,000 | 105,300 |
| | Magazine container cover catch..... | 730 | 1,200 | 1,300 | 7,740 | 10,800 | 11,700 | 10,530 |
| 88,000 | Magazine container hinge..... | 1,460 | 2,400 | 2,600 | 15,480 | 21,600 | 23,400 | 21,060 |
| 2,750 | Magazine container loading handle clip..... | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 22,000 | Magazine container spring..... | 365 | 600 | 650 | 3,870 | 5,400 | 5,850 | 5,265 |
| 11,000 | Magazine loader cartridge cut off screw..... | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |
| 11,000 | Magazine loader cartridge cut off spring..... | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |
| 11,000 | Magazine loader cartridge chute screw.. | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |

| Quantity. | Name. | Septem- ber. | Octo- ber. | Novem- ber. | Decem- ber. | January. | February. | March. |
|-----------|---|-----------------|---------------|----------------|----------------|----------|-----------|--------|
| 5,500 | Magazine loader clip ejector spring.... | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 2,750 | Magazine loader clip ejector plunger... | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 5,500 | Magazine loader clip ejector screw.... | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 2,750 | Magazine loader post nut..... | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 2,750 | Magazine loading handle..... | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 66,000 | Mainspring, including keeper..... | 1,095 | 1,800 | 1,950 | 11,610 | 16,200 | 17,550 | 15,795 |
| 2,750 | Mainspring casing..... | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 5,500 | Mainspring collet..... | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 5,500 | Mainspring collet pin..... | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 22,000 | Mainspring retaining rivet..... | 365 | 600 | 650 | 3,870 | 5,400 | 5,850 | 5,265 |
| 5,500 | Mounting yoke, assembled..... | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 2,750 | Mounting yoke clamp key..... | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 2,750 | Mounting yoke axis pin..... | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 11,000 | Mounting yoke axis pin washer..... | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |
| 11,000 | Mounting yoke split keeper..... | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |
| 5,500 | Oil can..... | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 5,500 | Piston..... | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 11,000 | Piston connecting pin..... | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |
| 2,750 | Rack..... | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 2,750 | Rear sight base..... | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 22,000 | Rear sight base rivet..... | 365 | 600 | 650 | 3,870 | 5,400 | 5,850 | 5,265 |
| 22,000 | Rebound pawl..... | 365 | 600 | 650 | 3,870 | 5,400 | 5,850 | 5,265 |
| 44,000 | Receiver locking pin..... | 730 | 1,200 | 1,300 | 7,740 | 10,800 | 11,700 | 10,530 |
| 5,500 | Recoil check..... | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 2,750 | Safety..... | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 11,000 | Sear..... | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |
| 88,000 | Sear pin (or trigger pin)..... | 1,460 | 2,400 | 2,600 | 15,480 | 21,600 | 23,400 | 21,060 |
| 88,000 | Sear spring..... | 1,460 | 2,400 | 2,600 | 15,480 | 21,600 | 23,400 | 21,060 |

| | | | | | | | | |
|---------|--|-------|-------|-------|--------|--------|--------|--------|
| 2,750 | Shell deflector bag..... | 45 | 75 | 80 | 485 | 675 | 730 | 000 |
| 5,500 | Shell deflector bracket fixing screw..... | 90 | 150 | 160 | 970 | 1,350 | 1,480 | 1,320 |
| 5,500 | Shell deflector bracket fixing screw washer..... | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 5,500 | Shell deflector bracket fixing screw stop nut..... | 90 | 150 | 160 | 970 | 1,350 | 1,480 | 1,320 |
| 5,500 | Shell deflector latch..... | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 5,500 | Shell deflector latch screw..... | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 11,000 | Shell extractor..... | 180 | 300 | 325 | 1,935 | 2,700 | 2,925 | 2,635 |
| 22,000 | Sight retaining spring..... | 365 | 600 | 650 | 3,870 | 5,400 | 5,850 | 5,265 |
| 2,200 | Spade grip, assembled..... | 35 | 60 | 65 | 390 | 540 | 585 | 525 |
| 2,750 | Spade grip handle..... | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 2,750 | Spade grip tang..... | 45 | 75 | 80 | 485 | 675 | 730 | 660 |
| 5,500 | Spade grip tang screw..... | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 5,500 | Spring balance..... | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 22,000 | Stop pawl..... | 365 | 600 | 650 | 3,870 | 5,400 | 5,850 | 5,265 |
| 88,000 | Stop and rebound pawl spring..... | 1,460 | 2,400 | 2,600 | 15,480 | 21,600 | 23,400 | 21,060 |
| 88,000 | Striker..... | 1,460 | 2,400 | 2,600 | 15,480 | 21,600 | 23,400 | 21,060 |
| 176,000 | Striker fixing pin..... | 2,920 | 4,800 | 5,200 | 30,960 | 43,200 | 46,800 | 42,120 |
| 5,500 | Trigger..... | 90 | 150 | 160 | 970 | 1,350 | 1,460 | 1,320 |
| 23,000 | Spanner..... | 365 | 600 | 650 | 3,870 | 5,400 | 5,850 | 5,265 |

for the consideration which the United States agrees to pay the Contractor as hereinafter provided.

This Contract will be performed under the following terms and conditions:

Article I. The United States will pay to the Contractor the prices as hereinbelow listed for spare parts:

| | Price. | | Price. |
|--|--------|---|--------|
| Back sight axis pin..... | \$0.03 | Combination cleaning rod, steel, consisting of handle and rod.. | \$0.33 |
| Back sight axis pin washer.... | .01 | Combination cleaning rod adaptor | .14 |
| Back sight axis pin split keeper.. | .01 | Cylinder cleaning brush, wire.. | .18 |
| Back set bed spring..... | .21 | Cylinder cleaning mop..... | .12 |
| Back sight body..... | .85 | Ejector | .62 |
| Back sight stem..... | 1.17 | Ejector cover..... | .07 |
| Back sight stem nut..... | .05 | Extractor | .41 |
| Barrel | 7.62 | Feed cover, not assembled.... | 16.33 |
| Barrel cleaning brush (bristle).. | .18 | Feed operating arm, consisting of operating arm and pawl retaining pin..... | 6.64 |
| Barrel retaining nut..... | 1.18 | Feed pawl..... | .35 |
| Bolt, complete, consisting of bolt, feed operating stud, and two extractors..... | 10.09 | Feed pawl spring..... | .02 |
| Butt stock, assembled, consisting of stock, plate, two plate screws, tang, and tang screw. | 7.41 | Front sight base..... | 1.06 |
| Butt plate..... | .16 | Front sight base screw..... | .01 |
| Butt plate screw..... | .01 | Gas chamber..... | 4.08 |
| Butt tang screw..... | .01 | Gas chamber gland..... | .85 |
| Butt latch..... | .44 | Gas regulator cup..... | .70 |
| Butt latch pin..... | .01 | Gas regulator key..... | .68 |
| Butt latch spring..... | .01 | Gas cylinder..... | 2.90 |
| Cartridge guide, assembled.... | .15 | Gas cylinder casing, including regulator key stud..... | .87 |
| Charging handle..... | .80 | Gear | 1.62 |
| Charging handle, extension.... | .13 | Gear casing..... | 4.47 |
| 12 | | | |
| Gear stop..... | \$0.44 | Mounting yoke clamp key..... | \$0.13 |
| Gear stop pin..... | .02 | Mounting yoke axis pin..... | .09 |
| Gear stop spring..... | .02 | Mounting yoke axis pin washer.. | .01 |
| Guard assembled, consisting of guard, right side piece, left side piece, and 2 side piece rivets | 4.00 | Mounting yoke split keeper.... | .01 |
| Guard side piece (pairs only), including 2 rivets..... | .06 | Oil can..... | .46 |
| Locking piece..... | 11.22 | Piston | 1.57 |
| Magazine, assembled (97 rounds). | 4.24 | Piston connecting pin..... | .02 |
| Magazine grip box..... | .12 | Rack | 5.50 |
| Magazine grip box rivet..... | .01 | Rear sight base..... | 1.04 |
| Magazine latch, assembled, consisting of latch, handle, and 2 latch handle rivets..... | .33 | Rear sight base rivet..... | .01 |
| Magazine latch spring..... | .08 | Rebound pawl..... | .44 |
| Magazine strap and clip..... | .07 | Receiver locking pin..... | .04 |
| Magazine strap rivet and washer | .01 | Recoil check, consisting of body and cap..... | 2.46 |
| Magazine center..... | 1.92 | Safety | .61 |
| Magazine spacer rivet..... | .01 | Sear | .42 |
| Magazine top plate..... | .07 | Sear pin (or trigger pin)..... | .01 |
| Magazine top plate rivet..... | .01 | Sear spring..... | .02 |
| Magazine container, complete (97 round magazine)..... | 2.53 | Shell deflector, assembled.... | 10.12 |
| Magazine container cover catch. | .08 | Shell deflector, bag, with hooks and buckle..... | .30 |
| | | Shell deflector bracket fixing screw | .46 |
| | | Shell deflector bracket fixing screw washer..... | .01 |

| | Price. | | Price. |
|----------------------------------|--------|----------------------------------|--------|
| magazine container hinge..... | .03 | Shell deflector bracket fixing | |
| magazine container loading | | screw stop nut..... | .01 |
| handle slip..... | .03 | Shell deflector latch..... | .44 |
| magazine container spring..... | .04 | Shell deflector latch screw..... | .01 |
| magazine loader cartridge cut | | Shell extractor..... | .34 |
| off screw..... | .04 | Sight retaining spring..... | .02 |
| magazine loader cartridge cut | | Spade, grip, assembled, consist- | |
| off spring..... | .03 | ing of grip handle, grip tang, | |
| magazine loader cartridge chute | | and grip tang screw..... | 4.32 |
| screw..... | .01 | Spade grip handle..... | .11 |
| magazine loader clip ejector | | Spade grip tang..... | 4.13 |
| spring..... | .04 | Spade grip tang screw..... | .09 |
| magazine loader clip ejector | | Spring balance..... | 1.00 |
| plunger..... | .02 | Stop pawl..... | .49 |
| magazine loader clip ejector | | Stop and rebound pawl spring.. | .02 |
| screw..... | .01 | Striker..... | .12 |
| magazine loader post nut..... | .02 | Striker fixing pin..... | .02 |
| magazine loading handle..... | .12 | Trigger..... | .51 |
| main spring, including keeper... | 1.23 | Spanner..... | .59 |
| main spring casing..... | .98 | Gun box..... | 3.79 |
| main spring collet..... | .53 | Hand book..... | .11 |
| main spring collet pin..... | .74 | | |
| main spring retaining rivet..... | .01 | | |
| mounting yoke, assembled, con- | | | |
| sisting of yoke, clamp, clamp | | | |
| key, axis pin, axis pin washer, | | | |
| axis pin split keeper, and | | | |
| hinge pin..... | 5.18 | | |

In addition to the above listed sum for each of the spare parts, the United States agrees to pay to the Contractor, as a royalty, a sum equal to 9.28 per cent of the price for each of the spare parts, except that for such final portion of the spare parts which shall be 3 for one hundred fifty (150) guns there will be paid to the Contractor as a royalty, a sum equal to four and sixty-four hundredths (4.64) per cent of the price of such spare parts, all of which is in accordance with the pamphlet entitled "Reduction of Royalties on Lewis Machine Guns Manufactured for the United States Government," dated March, 1918, and made a part hereof by reference.

Payments will be made by the United States to the Contractor as follows:

(1) A sum equal to 80 per cent of the actual cost to the Contractor of the component materials, delivered to the Contractor's plant in quantities requisite for the due and timely completion of this contract, purchased by the Contractor from sources approved by the Chief of Ordnance, will be paid to the Contractor promptly and not later than the 10th day after receipt, by the Chief of Ordnance, of the certificate of the inspecting and receiving officer that such materials have been delivered to the Contractor and inspected and approved by the receiving officer.

(2) If the Chief of Ordnance deems advisable, the United States may make other and more frequent payments than hereinbefore provided including payments to the Contractor for (a) direct labor used

enonagildo yavileb

in the production of the articles herein contracted for; (b) materials and other property to be used in the performance of this contract; (c) pro rata share of the factory overhead expense, applicable to and necessary in connection with the manufacture of the articles; and (d) pro rata share of administrative and general expense applicable to and necessary in connection with the manufacture of the
14 articles, provided, however, the sum of all payments as made under the provision of this Article, except payments on account of freight charges, shall not be in excess of the total purchase price.

The title to all material shall vest in the United States simultaneously with any payment on account thereof, by the United States, subject, however, to rejection of title at any time if found not to meet specification requirements. All of such material shall immediately upon its coming into possession of the Contractor, be marked for the purpose of identification, as the Chief of Ordnance shall so direct.

Should any such material to which the United States has taken title, as above provided, be destroyed while in possession of the Contractor, for any cause or agency, the Contractor shall replace the same without expense to the United States.

(3) Upon the certificate of the inspecting and receiving officer, showing delivery and acceptance, the United States will pay the difference between the amount paid under subdivisions (1) and (2) of this Article and the contract price for the spare parts.

Article II. The Contractor shall give to the performance of this Contract preference and priority over any other work or engagements, other than work heretofore given priority by the United States, and, if possible, shall anticipate the above schedule of deliveries.

The Chief of Ordnance may, by written notice to the Contractor at any time, make changes in the drawing and specifications or supplemental or substituted drawings and specifications which relate to, form a part of, or are added to this Contract. If such
15 changes involve additional expense, a fair addition may be made to the compensation, but if such changes involve less work or labor or material a fair deduction may be made therefrom, all as shall be determined by the Chief of Ordnance. No claim for addition or deduction on account of any change will be made or allowed unless the same has been ordered in writing by the Chief of Ordnance.

The Contractor will not be held responsible for delays in delivery determined by the Chief of Ordnance to have been due to causes beyond the control or without the fault of the Contractor, but, simultaneously with the removal of such causes for delay, the Contractor shall proceed with the performance of this Contract, allowance for such delay having been made. In view of the emergency necessitating this Contract, the Contractor shall use its best endeavors to remove such cause for delay. Deliveries in advance of the date or in excess of the quantities scheduled may be credited on subsequent delivery obligations.

The Contractor shall, at the cost of the United States, ship the articles to any point in the United States designated by the Chief of Ordnance and shall make all the necessary freight and shipping arrangements therefor.

Article III. The articles while in the process of manufacture and when completed shall be subject to inspection by persons designated by the Chief of Ordnance, and the Contractor shall furnish reasonable facilities and assistance for all such inspection. All articles and material which do not in all respects fulfill the requirements of this Contract shall be rejected and the decision of the Chief of Ordnance as to the quality thereof shall be final.

Upon notice from the Contractor that the articles, or any of them, are completed and ready for delivery, final inspection will be promptly made by the United States.

Article IV. In the event of the Contractor's inexcusable default in making the deliveries herein scheduled the Chief of Ordnance may cancel this Contract, without prejudice to any claim of the United States hereunder, and complete the manufacture, or purchase elsewhere, of all or any of the articles herein contracted for then remaining undelivered and charge the Contractor with all loss, damage, and expense in excess of the Contract price of the articles incurred as a result of such action.

Article V. No Member of or Delegate to Congress or Resident Commissioner is or shall be admitted to any share or part of this Contract, to any benefit that may arise therefrom; but this Article shall not apply to this Contract so far as it may be within the operation or exception of section 116 of the act of Congress approved March 4, 1909 (5 Stat., 1109).

Article VI. No person or persons shall be employed in the performance of this Contract who are undergoing sentences of imprisonment at hard labor which have been imposed by the courts of the several States, Territories, or municipalities having criminal jurisdiction.

Article VII. Except as this Contract shall otherwise provide, any doubts or disputes which may arise as to the meaning of anything in this Contract shall be referred to the Chief of Ordnance for determination. If, however, the Contractor shall feel aggrieved at any decision of the Chief of Ordnance upon such reference, it shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding on both parties hereto.

Article VIII. Wherever the term "Chief of Ordnance" is used in this Contract the same shall be construed to include the Acting Chief of Ordnance or any person designated to act as the Chief of the Ordnance Department, United States Army, or any person who is accredited as his duly authorized representative.

Article IX. Notice under this Contract, when not actually given, shall be deemed to have been sufficiently given to and received by

the Contractor when mailed in a sealed postpaid wrapper directed to the Contractor at the address given on page 3 of this Contract.

Article X. Neither this Contract nor any right to receive payment hereunder shall be assigned to any person, firm, or corporation.

Article XI. The spare parts herein contracted for shall be essentially duplicates of the spare parts exhibited to the representatives of the Ordnance Department at the works of the Savage Arms Corporation, Utica, N. Y., and all responsibility for their satisfactory performance upon acceptance test shall rest with the Contractor, unless defects develop as a result of rejection by the Ordnance Department of changes proposed by the Contractor.

Article XII. The Contractor agrees to hold and save the United States, and all persons acting under them, harmless from and against all liability on account of any patent rights granted by the United States which may affect the articles herein contracted for, or their manufacture, or the performance of this contract in any manner whatsoever.

Article XIII. The Contractor agrees to refrain from exploiting by publicity or otherwise its product manufactured in pursuance of this Contract, and the Contractor agrees to refrain from in any way publicly advertising the fact of the manufacture of said product, and to refrain from publishing or causing or allowing to be published any photographs, drawings, written or printed matter, or other data disclosing the articles, or parts of the same, or the process of manufacture, or the plans of the Government, or any information concerning the same or which shall result in such disclosure. The Contractor agrees to submit to the Chief of Ordnance all pictures or printed matter showing, describing, or in any way relating to the progress of the work to be prosecuted under this contract, which it may desire to publish, before publishing the same, and the Chief of Ordnance may prohibit such publication. The Contractor further agrees to refrain from giving any information whatsoever relative to any experiments that may be carried out by it at the instance of the United States.

Article XIV. It is understood and agreed that the Contractor shall retain intact and in good working condition, so long as the Lewis Machine Gun, Model of 1917, Aviation Type, remains a service weapon, all drawings, gauges, fixtures, dies, and other appliances in forming a part of the machine, required in the production of the material herein contracted for; and that the Contractor shall furnish the United States with a blue print of every drawing, fixture, die, and other appliance used by the Contractor in the manufacture of this material, except where such blue print would be duplicate of drawings furnished by the Contractor to the Ordnance Department.

Article XV. It is understood and agreed that the Contractor will not knowingly employ, directly or indirectly, any employee who within the preceding two months, has been employed by any other firm manufacturing machine guns or machine rifles for the Ord-

ance Department, United States Army, without first obtaining the written consent of such other concern.

Article XVI. It is understood and agreed that a complete set of drawings covering the articles herein contracted for, shall be furnished by the Contractor. This provision is not intended to require the Contractor to furnish drawings which have already been furnished by the Contractor under previous contracts, but it is only intended to require the Contractor to furnish drawings of new material.

9 Article XVII. In addition to the ordinary precautions heretofore adopted by the Contractor for the guarding and protection of its plant and work, the Contractor shall provide such additional watchmen and devices for protection of its plants and property and the work in progress for the United States against espionage, acts of war, and of enemy aliens as may be required by the Chief of Ordnance. The Contractor shall, when required, report to the Chief of Ordnance the citizenship, country of birth, or alien status of any and all of its employees. When required by the Chief of Ordnance the Contractor shall refuse to employ, or, if already employed, forthwith discharge from employment and exclude from its works, any person or persons designated by the Chief of Ordnance or cause as undesirable for employment in a plant engaged on work for the United States. The United States shall pay to the Contractor as part of the cost of the article any expense incurred by the Contractor which shall be determined by the Chief of Ordnance to be directly caused by the requirements of this Article.

In witness whereof the parties hereto have caused these articles of agreement to be executed under their seals (in sextuplicate) by their respective officers, duly authorized, the day and year first above written.

Signatures:

(Stamp:)

(Sgd.) SAVAGE ARMS CORPORATION,
By W. L. WRIGHT,
Vice-President.

Witness:

(Sgd.) A. C. BARKER.

THE UNITED STATES OF AMERICA,
By SAMUEL McROBERTS,
Colonel, Ordnance Department, National Army,
Contracting Officer.

Witness:

EDW. A. DETERS.

Approved:

CHAS. N. BLACK,
Lt. Col. Ord. Dept., National Army.

Contract Section: ____.

Negotiating Section: ____.

Notes.

All manufacturers doing any part of the work contemplated by this Contract shall comply with the provisions of the naval appropriation act approved March 4, 1917, and Executive Order of the President dated March 24, 1917, in respect to wages of persons employed upon contracts with the United States in so far as such provisions may be applicable thereto, so long as said act approved March 4, 1917, and said Executive Order dated March 24, 1917, shall be in force and effect.

The articles covered by the within Contract should be charged to the Chief of Ordnance, U. S. Army.

The original and two (2) copies of the invoice and two (2) copies of the bills of lading and shipping notices, if any, should be promptly forwarded, through the Inspector of Ordnance at the Manufacturer's plant, to the Inspection Division, Ordnance Department, U. S. Army, Washington, D. C.

21 EXHIBIT B.

To insure prompt attention in reply refer to PL No. CMG-48.

War Department,
Office of the Chief of Ordnance,
Procurement Division,
Washington.

Savage Arms Corporation,
Utica, N. Y.

January 29, 1919.

GENTLEMEN:

1. By direction of the Chief of Ordnance you are requested in the public interest immediately to suspend operations under your contract, or order, with the United States, War-Ord-No. CMG-48, to the extent of 298,000 magazines together with their spare parts.

You are also requested, except for the purpose of completing deliveries or in cases of proved necessity, to order no further materials or facilities, enter into no further sub-contracts, make no further commitments, and incur no further expenses in connection with the performance of said contract, or order.

2. This request is made with a view to the negotiation of a supplemental contract providing for the modification, settlement and adjustment of your existing contract or order, in a manner which will permit of a prompt settlement.

3. Please acknowledge receipt of this notice immediately and indicate your decision as to compliance with or rejection of this request. Upon notice of your compliance, a representative of the Ordnance

Department will forthwith take up with you the proposed negotiation.

Respectfully,

By C. E. SHOLES,
Major, Ord. Dept. U. S. A.,
Contracting Officer.

Form "I" Special.
Rochester District Ordnance Office.

PS.

EXHIBIT C.

To insure prompt attention in reply, refer to War Ord. AC-No. MG-48-A.

War Department,
Office of the Chief of Ordnance,
Procurement Division,
Washington.

"Suspension Request."

September 12, 1919.

Savage Arms Corporation,
Utica, N. Y.

GENTLEMEN:

1. By direction of the Chief of Ordnance you are requested in the public interest immediately to suspend further operations under your contract, or order, with the United States, War-Ord.-No. CMG-48-A, except such operations as may be necessary to complete delivery hereunder of a total (including all deliveries heretofore made) of 98,000 magazines together with their spare parts.

You are also requested, except for the purpose of completing such deliveries or in cases of proved necessity, to order no further materials or facilities, enter into no further sub-contracts, make no further commitments, and incur no further expenses in connection with the performance of said contract, or order.

2. This request is made with a view to the negotiations of a supplemental contract providing for the modification, settlement and adjustment of your existing contract or order, in a manner which will permit of a prompt settlement.

3. Please acknowledge receipt of this notice immediately and indicate your decision as to compliance with or rejection of this request. Upon notice of your compliance, a representative of the Ordnance Department will forthwith take up with you the proposed negotiation.

4. This supersedes all previous letters of suspension.

Respectfully,
(Signed)

R. H. HAWKINS,
Lt. Col., Ord. Dept., U. S. A.

Form "I".
Rochester District Ordnance Office.
O. M. S.

EXHIBIT D.

Lt. Col. R. H. Hawkins,
Ordnance Department, U. S. A.,
Procurement Division,
Office of the Chief of Ordnance,
War Department, Washington, D. C.

September 24, 1919.

Subject: "Suspension Request."

Reference: War Ord. A. C-No. CMG-48 A.

SIR:

1. Acknowledgment is hereby made of "Suspension Request" above referred to, bearing date September 12, 1919, substituted for incorrect Suspension Request dated January 29, 1919.

2. This Corporation has suspended work in accordance with said Request, reserving, however, all its rights against the United States Government, or any department or officer thereof, for failure
24 of the Government fully to perform all the provisions of the contract known as No. CMG-48A and especially its rights to recover all the profits which it would have made had it been permitted to complete said contract.

Respectfully,

SAVAGE ARMS CORPORATION,
By W. L. WRIGHT,
President.

EXHIBIT E.

September 24, 1919.

Lanham Robertson,
Secretary Rochester District Claims Board,
82 St. Paul Street,
Rochester, N. Y.

Subject: Suspension of unfilled portion CMG-48A Contract.

Reference: (a) Unfilled Portion Represents 142,000 Extra Magazines for Lewis Machine Guns.

SIR:

1. We acknowledge herewith receipt of your "Suspension Request" dated September 12, 1919, on contract CMG-48A.

2. We enclose herewith acknowledgment of said request and announcement of our compliance therewith.

3. It is our understanding that under paragraph 5 of Supply Circular No. 111, your Board and the Army Ordnance Department will not authorize or make any settlement or payment to prime contractor on account of prospective profits.
25 Will you kindly confirm this understanding, if correct.

Respectfully,

SAVAGE ARMS CORPORATION,
By W. L. WRIGHT,
President.

EXHIBIT F.

War Department,
Office of Ordnance District Chief,
82 St. Paul St.,
Rochester, N. Y.

September 26, 1919.

Savage Arms Corporation,
50 Church Street,
New York, N. Y.

Attention Mr. W. L. Wright, President.

Subject: Suspension of Contract CMG-48A.

GENTLEMEN:

Your favor of the 24th with enclosures received. Your understanding of paragraph 5 of Supply Circular 111 is correct.

ROCHESTER DISTRICT CLAIMS
BOARD,
By LANHAM ROBERTSON,
Secretary.

28

EXHIBIT G.

October 20, 1919.

Mr. Lanham Robertson,
Secretary Rochester District Claims Board,
82 St. Paul Street,
Rochester, N. Y.

SIR:

Referring to our contract CMG-48A, upon which suspension request was first served January 29, 1919, and subsequently, in a corrected form, on September 12, 1919, we are and have been since the making of said contract willing and able to complete the entire quantity of 440,000 magazines specified therein.

We have offered verbally to accept the cancellation of the 142,000 magazines covered by the above mentioned suspension request on the basis that we be paid anticipated profits thereon.

We have had confirmed by your letter of September 26, 1919, the fact that the Claims Boards under the Ordnance Department have no jurisdiction to grant anticipated profits to a prime contractor. We, therefore, request you to inform us which of the following methods you propose to follow in disposing of this matter:

1. Take delivery of the suspended quantity of magazines.
2. Advise us that these magazines will not be taken under this contract.
3. Summarily cancel 142,000 magazines thereunder enabling us to present our case in the Court of Claims.

We believe we are justified in asking for action by your Board, without delay, as above specified.

Respectfully,

W. L. WRIGHT,
President.

27

EXHIBIT H.

Administration Division,
War Department,
Office of the Chief of Ordnance.

RHH-jg.

3727 Munitions Bldg.

Replying refer to A-C No. CMG-48-A.
Att.—Lt. Col. R. H. Hawkins.

November 17, 1919.

Savage Arms Corporation,
50 Church Street,
New York City, N. Y.

SIRS:

1. I am directed by the Chief of Ordnance to advise you that the United States will not accept or pay for 142,000 Magazines remaining undelivered under the terms of the Order designated War-Ord-CMG-48-A, dated April 30, 1918.

2. Under date of October 20, 1919, you addressed the Rochester District Claims Board—attention Mr. Lanham Robertson, Secretary—requesting the Ordnance Department to take delivery of these 142,000 magazines. The Small Arms Division of the Ordnance Department advises this Office, under date of November 14, 1919 (OMS. 160/366—O.O.167/60500), that the Ordnance Department cannot use these undelivered Magazines.

3. In the same communication of October 20, 1919, you stated that you will accept the Suspension Request submitted to you under

date of September 12, 1919, only upon the agreement of the Ordnance Department to pay you anticipated profits on the said 27½ undelivered 142,000 magazines. The Ordnance Department is not authorized to pay you any anticipated profits on account of such undelivered articles.

4. This is to advise you that the Ordnance Department will not accept the said undelivered 142,000 Magazines.

Respectfully,

R. H. HAWKINS,
Lt. Col. Ord. Dept., U. S. A.,
Contracting Officer.

28 II. *General Traverse.*

Filed Feb. 7, 1920.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. *History of Proceedings.*

On November 10, 1921, this case was argued and submitted on merits by Mr. Jesse C. Adkins, for plaintiff, and Mr. William F. Norris, for defendant.

On January 16, 1922, the Court handed down findings of fact, conclusion of law, and entered judgment dismissing the petition and also entered judgment against plaintiff in the sum of \$534.90, for the cost of printing the record, with an opinion by Booth, J.

On March 15, 1922, the plaintiff filed a motion for a new trial and to amend findings of fact.

On May 2, 1922, the plaintiff's motion for a new trial and to amend findings of fact was argued and submitted by Mr. Jesse C. Adkins, for plaintiff, and Mr. W. F. Norris, for defendant.

On May 15, 1922, the Court entered the following order:

Order.

It is ordered by the Court that the plaintiff's motion to amend findings be and the same is allowed in part and overruled in part. The former findings are vacated, set aside and withdrawn and new findings this day filed. The judgment and opinion to stand.

By THE COURT.

29 IV. *Findings of Fact (as Amended May 15, 1922), Conclusion of Law, and Opinion of the Court by Booth, J.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff is, and was during the different transactions set forth in these findings, a corporation duly incorporated under the laws of the State of Delaware, with its principal place of business in New York City, and a factory located at Utica, New York, devoted, during the war with Germany, exclusively to the manufacture of Lewis machine guns and spare parts therefor, including magazines.

The plaintiff had with the United States, including the contract in this case, 18 contracts for the manufacture and delivery of magazines for Lewis machine guns for the Army, Navy, and Marine Corps, under which it had actually delivered, up to and including June 20, 1919, 2,201,568 such magazines, the profits on which were \$4,417,546.98. The Government taxes paid on plaintiff's net profits during the year 1918 amounted to 66.3 per cent. There were also other large contracts for the manufacture and delivery of machine guns, small arms, and munitions of different kinds. The Government also expended, under a contract for increasing plaintiff's facilities, the sum of \$2,850,000 for the erection of buildings and machinery, the title to which remained in the Government.

The numerous accounts relating to the various activities of the plaintiff in carrying out Government contracts were pending during the performance of the contract upon which this suit was brought.

II.

The plaintiff and the United States entered into a contract dated April 30, 1918, known as War Ordnance C. M. G. 48-A, a copy of which was filed as Exhibit A to the plaintiff's petition and is made a part of this finding of fact by reference thereto. There was another contract with the Savage Arms Corporation for 22,000 Lewis aircraft machine guns, dated June 6, 1918 known as War Ordnance C. M. G. 48. The two had originally been one contract, but were finally separated.

The Savage Arms Corporation signed said contract, by W. L. Wright, vice president, and the United States by Samuel McRoberts, colonel, Ordnance Department, National Army, contracting officer, and Charles N. Black, lieutenant colonel, Ordnance Department, National Army. The name of Samuel McRoberts was signed in print and the names of W. L. Wright and Charles N. Black in their handwriting. At the time said contract was executed all such contracts were required to be signed by Samuel McRoberts, or in his name by Charles N. Black, or any one of four other designated officers of the Ordnance Department.

The oath required by section 3745 of the Revised Statutes was taken by Colonel Black on July 23, 1918.

By said contract, C. M. G. 48-A, the plaintiff agreed to manufacture and deliver to the United States, and the United States

reed to pay for certain spare parts for 22,000 Lewis machine guns. The only item of said contract involved in this suit is the one for 10,000 magazines for said Lewis machine guns, aviation type, for which \$4.24 each was agreed to be paid by the defendant.

III.

The plaintiff promptly entered upon the performance of its contract, and while so engaged, entered into a supplemental contract with the United States, dated January 13, 1918, regular in every particular, by which the requirement for the manufacture and delivery of 22,000 shell deflectors contained in the contract of April 30, 1918, was canceled because it was a duplication of the same requirement in the contract of June 6, 1918, and the United States was released from all claims and demands arising out of or in connection with such cancellation. The said supplemental contract also contained the following provision:

"Except as herein modified, all the terms and conditions of the said contract dated April 30, 1918, shall remain in full force and effect."

Attached to the said supplemental contract was a circular headed "Additional terms and conditions," without address or signature, and to which no reference was made in said contract. Such circulars, beginning with October 20, 1918, were frequently attached to procurement orders, purchase orders, and contracts, which sometimes referred to said circulars and sometimes did not.

Paragraph (g) of these circulars reads:

"If in the opinion of the Chief of Ordnance the public interest shall so require, this order may be terminated by the United States at any time by notice in writing to the contractor from the contracting officer of the United States, and such termination shall be deemed to be effective immediately upon the giving of such notice, or the contracting officer may notify the contractor that any part or parts of the articles, material, or work then remaining undelivered or unperformed shall not be manufactured, delivered, or performed."

IV.

Deliveries of magazines under contract C. M. G. 48-A calling for 10,000 magazines, began on September 28, 1918, and during the months of September, October, and December 24,347 such magazines were delivered.

Thereafter, on January 29, 1919, a notice was issued from the office of the Chief of Ordnance (Procurement Division) at Washington, signed by the contracting officer thereof and addressed to the plaintiff at Utica, N. Y., as follows:

"1. By direction of the Chief of Ordnance you are requested in the public interest immediately to suspend operations under your

contract, or order, with the United States, War-Ord. No. C. M. G. 48, to the extent of 298,000 magazines, together with their spare parts.

"You are also requested, except for the purpose of completing deliveries or in cases of proved necessity, to order no further materials or facilities, enter into no further subcontracts, make no further commitments, and incur no further expenses in connection with the performance of said contract, or order.

"2. This request is made with a view to the negotiation of a supplemental contract providing for the modification, settlement and adjustment of your existing contract or order, in a manner which will permit of a prompt settlement.

"3. Please acknowledge receipt of this notice immediately and indicate your decision as to compliance with or rejection of this request. Upon notice of your compliance, a representative of the Ordnance Department will forthwith take up with you the proposed negotiation."

This notice was forwarded to the Rochester District Claims Board for delivery to plaintiff, and its purport having been communicated to plaintiff, an agent of the latter entered into verbal negotiations with an official of the claims board relative to the same. An understanding was arrived at between this agent and official to the effect that the order of suspension should operate to the extent of 142,000 magazines instead of the 298,000 stated in the notice. Thereupon plaintiff wrote under date of February 13, 1919, to the secretary of the said District Claims Board as follows:

"We have your letter of January 31st, inclosing suspension notice dated January 29th from Washington, covering the suspension of work on a certain quantity of magazines on War-Ord. C. M. G. 48. Our Mr. Phillips, from Utica, has discussed this matter with you, and it is understood that the suspension notice as received is not correct. We therefore await a change in the wording of this notice to correspond with the later instructions received at our Utica plant."

The plaintiff knew that the said notice of January 29, 1919, related to the contract for furnishing 440,000 magazines, designated in Finding II as C. M. G. 48-A. It was the only contract that called for the specific number 440,000. The contract designated as C. M. G. 48 for the manufacture of 22,000 Lewis aircraft machine guns had been completed on December 31, 1918.

It does not appear from the evidence what member of the District Claims Board informed plaintiff that the suspension notice of January 29, 1919, was incorrect and allowed it to manufacture and deliver 298,000 magazines instead of 142,000. It does appear from the evidence, however, that the Rochester District Claims Board had no authority to change the suspension order of January 29, 1919.

The plaintiff never replied to the notice of the contracting officer at Washington of January 29, 1919, but took the suspension order

up with the District Claims Board, or some member thereof, instead. On August 1, 1919, the chief of the contract section of the Ordnance Department did not know that the suspension of the delivery of 298,000 magazines had been changed to 142,000. The District Claims Board, on July 18, 1919, requested the Chief of the Contract Section to issue an order of suspension against contract C. M. G. 48-A, but did not mention the change that had been made in the notice. In reply to this letter, the Chief of Ordnance, on August 1, 1919, notified the District Claims Board that he was willing to relieve the plaintiff from the manufacture and delivery of 298,000 magazines. There is nothing in the evidence to show that the Ordnance Office at Washington was ever informed of the change made in the suspension notice of January 29, 1919, until after the substitute suspension notice of September 12, 1919, was issued.

Before its letter of February 13, 1919, was written the plaintiff had stopped work on the 142,000 magazines, having received verbal instructions above mentioned to discontinue the manufacture of that number, although the written instructions stated 298,000.

The plaintiff, following its letter of February 13, 1919, proceeded to make further deliveries of magazines during the year 1919, as follows:

| | | | |
|--------------|--------|--------------|--------|
| Feb. 15..... | 9,600 | Mar. 31..... | 4,800 |
| Feb. 17..... | 14,592 | Apr. 4..... | 18,672 |
| Feb. 20..... | 13,146 | Apr. 9..... | 12,096 |
| Mar. 5..... | 13,344 | Apr. 10..... | 1,872 |
| Mar. 8..... | 12,432 | Apr. 11..... | 12,672 |
| Mar. 13..... | 14,400 | Apr. 16..... | 12,672 |
| Mar. 15..... | 14,400 | Apr. 18..... | 8,470 |
| Mar. 19..... | 14,400 | Apr. 24..... | 18,624 |
| Mar. 21..... | 14,400 | Apr. 30..... | 18,816 |
| Mar. 24..... | 14,400 | Apr. 30..... | 6,960 |
| Mar. 24..... | 4,000 | May 7..... | 4,485 |
| Mar. 26..... | 14,400 | | |

until it had delivered 273,653, which, added to the number delivered prior to the suspension notice, 24,347, makes the 298,000 magazines which were delivered and paid for, the last payment having been made on May 21, 1919.

After completing said deliveries the plaintiff made no request to be allowed to furnish the 142,000 remaining of the whole number named in the contract. Thereafter some of the orders for materials were canceled, and some of the machinery for manufacturing said magazines was removed and the space occupied for other purposes.

At the time contract 48-A was pending the plaintiff had a large number of contracts with the Government, 18 for furnishing magazines, besides contracts for furnishing machine guns, small arms, and other munitions, and numerous accounts relating to such contracts. The plaintiff was therefore anxious to close this contract on its books, particularly so as there was some discussion going on among the

33 ordnance officials in Washington about what had become of the suspension order of January 29, 1919, and a possibility, when the unauthorized changes became known, of charging back 156,000 magazines (the difference between 142,000 and 298,000) against the plaintiff as having been improvidently accepted and paid for.

The plaintiff, with this end in view, wrote a letter dated July 8, 1919, to the secretary of the Rochester District Claims Board, which reads:

"Reference: (a) Unfilled Portion Represents 142,000 Extra Magazines for Lewis Machine Guns.

"DEAR SIR:

Referring to the writer's conversation with you over the long-distance telephone this afternoon, if you have not already done so we will thank you to make immediate arrangements to make application to Col. R. H. Hawkins, chief of the contract section, Administration Bureau, Washington, for suspension request to be sent to us through your office, terminating the above-mentioned C. M. G. 48-A contract, on which there are now due to the Government the quantity of 142,000 extra magazines for Lewis machine guns.

"Upon receipt of this suspension request we hereby agree to immediately accept it without making claim for any portion of the 142,000 magazines so suspended.

"By reason of change in design in the magazine furnished under this contract, we, the contractor, sustained a substantial loss of profit by reason of lost production, and inasmuch as this contract will have been suspended upon acceptance of the above-mentioned suspension request, we will then accordingly file our claim for recovery of this lost profit."

The change in design referred to in the above letter was made in June, 1918, under article 2 of the contract, and provided Veeder counter indicators and dust covers for the magazines for Lewis machine guns.

On July 10, 1919, without awaiting a reply to its said letter of July 8, 1919, the contractor filed with the Rochester District Claims Board a claim in entire accordance with the statement of said letter of July 8, stating its claim at the sum of \$181,213.27, alleged to be on account of lost production of magazines under contract C. M. G. 48 and C. M. G. 48-A, due to change in design of same. This claim was disallowed by the board, the grounds of disallowance not being shown by the record.

The plaintiff also presented another claim growing out of said change in design of the magazines. It was the cost of making and attaching the Veeder counter indicators and dust covers and the prices were agreed upon by the Government and the plaintiff at 9 cents each for the counters and 8 cents each for the dust covers, aggregating \$26,711.03, which was paid on November 12, 1919.

After writing the letter of July 8, 1919, the plaintiff persistently and repeatedly urged the officials of the ordnance office to revise the suspension order of January 29, 1919, by an order authorizing the delivery of 298,000 magazines.

A letter from the plaintiff, signed by Mr. Barker, and addressed to Mr. Horton, dated August 20, 1919, reads:

"DEAR MR. HORTON:

Referring to the writer's conversation with you under date of August 14th, 1919, this will confirm the fact that there remains undelivered on the above-mentioned contract 142,000 magazines for Lewis machine guns.

34 "As we have received and accepted no suspension request for this number, it will be appreciated if you will have forthcoming suspension request for our acceptance in termination of this contract.

"Some time ago we received verbal instruction of the Rochester district office to discontinue the manufacture of these magazines, as they were not wanted. So that there will be no misunderstanding, we are anxious to receive and accept suspension request, otherwise the contract will remain open on our books."

Finally, a verbal agreement was arrived at between Mr. Barker, representing the plaintiff, and Mr. Horton, representing the defendant, by which the plaintiff agreed to abandon and settle all claims, controversies, and disputed points growing out of contract 48-A if Mr. Horton would secure a revision of the "suspension order" of January 29, 1919, so as to allow the delivery of 298,000 magazines instead of 142,000.

Mr. Horton performed his part of the agreement, and as the result of his efforts the suspension order dated September 12, 1919, was issued, addressed to plaintiff by direction of the Chief of Ordnance, and signed by Lieutenant Colonel Hawkins, of the Ordnance Office. The order reads:

"1. By direction of the Chief of Ordnance you are requested in the public interest immediately to suspend further operations upon your contract, or order, with the United States, War-Ord. No. C. M. G. 48-A, except such operations as may be necessary to complete delivery thereunder of a total (including all deliveries heretofore made) of 298,000 magazines together with their spare parts.

"You are also requested, except for the purpose of completing such deliveries or in cases of proved necessity, to order no further materials or facilities, enter into no further subcontracts, make no further commitments, and incur no further expenses in connection with the performance of said contract or order.

"This request is made with a view to the negotiations of a supplemental contract providing for the modification, settlement, and adjustment of your existing contract or order in a manner which will permit of a prompt settlement.

"3. Please acknowledge receipt of this notice immediately and indicate your decision as to compliance with or rejection of this request. Upon notice of your compliance a representative of the Ordnance Department will forthwith take up with you the proposed negotiation.

"4. This supersedes all previous letters of suspension."

14 All questions of the deduction of payments for the 156,000 magazines delivered in excess of the order of January 29, 1919, having been settled, the plaintiff, by letter dated September 24, 1919, acknowledged the receipt of the order of September 12, as follows:

"1. Acknowledgment is hereby made of 'suspension request' above referred to, bearing date September 12, 1919, substituted for incorrect suspension request dated January 29, 1919.

"2. This corporation has suspended work in accordance with said request, reserving, however, all its rights against the United States Government, or any department or officer thereof, for failure of the Government fully to perform all the provisions of the contract known as No. C. M. G. 48-A and especially its rights to recover all
35 the profits which it would have made had it been permitted to complete said contract."

Thereafter the plaintiff wrote several letters to the office of the Chief of Ordnance, making inquiry as to the intention of the Government regarding the delivery of the remaining 142,000 magazines, or the payment of prospective profits on its refusal to receive such magazines, to which the Chief of Ordnance finally, on November 17, 1919, replied that the Government could not use and would not accept delivery of the remaining 142,000 magazines, and that he was not authorized to pay anticipated profits on such magazines.

V.

✓ When the notice of suspension of January 29, 1919, was received in February, the plaintiff was in the midst of the performance of its contract, and was at the height of its production, making 5,000 magazines a day, and was in a condition to have performed its entire contract without difficulty.

VI.

On the 298,000 magazines manufactured and delivered under the contract of April 30, 1918, the plaintiff made an average profit of \$2.007 each, or a total profit of \$598,086. If the plaintiff had completed its contract it would have made a profit of \$284,994 on the remaining 142,000 magazines.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed. Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion.

BOOTH, *Judge*, delivered the opinion of the court:

The plaintiff company on April 30, 1918, entered into a written agreement with the defendant to supply, among other things, 440,000 magazines, to be used by the defendant in connection with Lewis machine guns. The contract was made during the war with Germany, and was one among several others obligating the plaintiff to furnish the defendant with arms and munitions of war.

On January 29, 1919, following the armistice, the defendant notified the plaintiff in writing that it would suspend the contract to the extent of 298,000 magazines, and invited negotiations for a supplemental contract looking toward a prompt adjustment and settlement of contract rights. The plaintiff company, for some reason, contended that the suspension notice was erroneous and should not have been for the total number of 298,000 magazines. An alleged verbal conversation, and one or more over the telephone with the officers of the defendant, members of the Rochester District Claims

Board, located at Rochester, N. Y., according to its version of the affair resulted in a verbal statement that the suspension order was construed by them as not intended to extend further than 142,000 magazines. The plaintiff wrote the Rochester District Claims Board on February 13, 1919, stating that the suspension order was erroneous, and asking for a corrected suspension in accord with its verbal understanding, a matter over which it had no jurisdiction. As a result of this misunderstanding a considerable correspondence ensued and considerable time elapsed before the negotiations culminated in a settlement. In the meantime the plaintiff proceeded with the manufacture of magazines and did not suspend until May 7, 1919, when it had completed and delivered, and on May 21, 1919, received payment for 298,000 magazines, notwithstanding the fact that its letter of February 13, 1919, had not been answered, and that no correction of the suspension order of January 29, 1919, had been obtained. No competent evidence discloses any authorized amendment or correction of the suspension order of January 29, 1919, nor can we find in the record who gave it or what its exact terms, were, other than that 142,000 was the number to be substituted for 298,000 magazines. Thus we find the plaintiff acting upon a verbal modification of a written order of suspension extending expressly to 298,000 magazines, manufactur-

ing, delivering, and receiving payment for the identical number it had been notified to suspend, and making but one feeble effort to have the verbal modification put in writing, until a date subsequent to the time when said magazines had been delivered and paid for. The plaintiff's attitude then, at this stage of the proceedings, as shown by the record, was simply this: We received a written order to suspend the manufacture of 298,000 magazines. We communicated with the defendant and it was verbally agreed that we might furnish 298,000 magazines and suspend 142,000. We furnished the 298,000; the defendant paid for them. We then in January did suspend the 142,000. We made no effort to manufacture or deliver the same, but on the contrary specifically asked for and agreed to accept a suspension order for the 142,000.

Why do we say this? Because the inference is irresistible. After the plaintiff had completed the manufacture and delivery of the 298,000 magazines and been paid therefor, its officers realized that this transaction had been closed upon the bare, uncertain authority of a verbal order, and therefore it was persistent and energetic in its efforts to have this past transaction officially and expressly closed by the proper authority, so that in no event could the large sums of money it had received thereunder be checked against other sums due the plaintiff under other contracts, aggregating millions of dollars.

This view of the situation is expressly confirmed and substantially put at rest by the letter of July 8, 1919, written by the plaintiff to the Rochester District Claims Board, wherein the plaintiff in positive terms expressly agrees to waive all claims for any portion of alleged damages due to the suspension of 142,000 magazines, if the officer addressed will "make immediate arrangements * * * for suspension request to be sent to us through your office terminating the above-mentioned C. M. G. 48-A contract." This letter of July 8, 1919, was the result of a verbal agreement between the plaintiff and the officers of the Rochester District Claims Board, subsequently ratified and confirmed by the Chief of Ordnance of the War Department at Washington. The history of this transaction alone

37 is sufficient to determine the case adversely to plaintiff's contention. The plaintiff had suspended the manufacture of 142,000 magazines, a conference as to its claims had taken place between its representatives and the officers of the Rochester District Claims Board, where the plaintiff's representatives talked over the possibility of a claim for profits on the 142,000 magazines suspended, and at the same time a claim for a large sum of money due to a change in design of the magazines made during the course of manufacture. This claim embraced a charge for an alleged "lost production," a damage due to a slowing down of production caused by the addition to the magazines of Veeder counter indicators and dust covers. It was not confined alone to the number of magazines manufactured under contract C. M. G. 48-A, but by its own terms included 16,661 magazines delivered under contract C. M. G. 48. The total amount claimed is \$181,213.27, arrived at by charging a certain percentage of overhead expenses against the manufacture of 314,661 magazines, or 16,661 in excess of those delivered under contract C. M. G. 48-A.

The officers of the Rochester District Claims Board declined to consider any claim for lost profits, at the same time representing to the plaintiff that pursuit of a claim for profits in the United States Court of Claims involved a period of time extending for at least half a century, an interminable controversy, with no hope of immediate redress, and the plaintiff, without investigation, however preposterous the statements were, accepted the same, and expressly agreed that the allowance of the claim for lost production would be accepted by it in full of all claims and demands whatsoever growing out of the suspension of the manufacture and delivery of the 142,000 magazines then undelivered. The above claim was mailed to the Rochester District Claims Board July 10, 1919, and received July 12, 1919. This most remarkable transaction, though finally culminating in the disallowance of the claim as presented, remains a most potent factor in depicting the attitude of the plaintiff toward a settlement of differences with the defendant, another step toward the procurement of an authenticated suspension order for 142,000 magazines, and an express approval of what had been done under its contract. The transaction itself was quite unique, the plaintiff agreeing to balance one claim against another, both of substantially the same character, inasmuch as both involved anticipated profits. The contract in express terms authorized changes in the specifications and design of the articles to be furnished, and provided a method of payment therefor. There was little or no room for dispute, yet we find the plaintiff company presenting a disputatious claim under this very article of the contract, totaling a sum far in excess of the compensation afterwards agreed upon, and making it the basis of a composition, which would in the end reimburse it for very close to the amount it now claims as anticipated profits on the undelivered 142,000 magazines. Stranger still, while this very claim is pending and undisposed of, negotiations are going forward looking toward an agreement for the payment of the cost of the change in specifications and design—the change involved in the large claim presented, and the only one made in the contract—which finally results in the allowance to plaintiff of the sum of \$26,711.03, which amount the plaintiff accepted, after the formal disallowance of its item for lost production or increased overhead expenses, to wit, November 12, 1919. What reason there was for a division of this particular claim is explainable only upon the hypothesis that the plaintiff anticipated thereby the securing of the suspension agreement, the approval of its course in manufacturing the 298,000 magazines in the face of an express suspension order for that number, and effectually closing the transaction against the possibility of a checkage against the 156,000 magazines manufactured and delivered in excess of those suspended, as well as a means of invoking the jurisdiction of the Rochester District Claims Board upon a claim which it considered within its jurisdiction, and facilitating its allowance by a proposition to forego all other claims—of which the board had no jurisdiction—if the exact amount claimed would be allowed. Having failed to reach a final adjustment in the method described above,

the plaintiff, still extremely anxious to close the transaction, approached Mr. Horton, and on August 20, 1919, wrote the letter set forth in Finding IV. In this letter the failure to receive the corrected suspension order is again stressed, and the language of the same clearly and unmistakably indicates its acceptance is to be treated as a termination of the contract. Negotiations follow, and the course of the negotiations, together with the final result, and the acceptance of the \$26,711.03, disclose an agreement, express and beyond doubt, to close the differences between the parties upon the basis agreed upon. The confirmation of this final agreement does not rest wholly on parol evidence, for in accord with what was admittedly said by the respective parties, appears the written suspension order of September 12, 1919, from the Chief of Ordnance in Washington, wherein the number suspended is given as 142,000 magazines instead of, as in the original order of January 29, 1919, 298,000 magazines. The effect of this was an authenticated acceptance of the 298,000 magazines theretofore delivered, and for which the defendant had no use whatever. The fact that for a period of nine months negotiations had been pending; that during all this time the defendant did not alter, modify, or change the original suspension order, notwithstanding the insistence of the plaintiff that it was erroneous, and especially in view of the fact that the Ordnance Office at Washington did not concur in this contention, coupled with the final change, corroborates with indisputable force the fact that there was an express agreement to close the transaction on the basis of the acceptance without question of the 298,000 magazines, the payment for the change in design, in consideration of which the plaintiff agreed to waive all claims for prospective profits, and close the transaction on its books.

✓ This change in the order, whereby the plaintiff proceeded to make and deliver 298,000 magazines instead of 142,000, was acted upon by the plaintiff without any kind of objection on its part. It not only suspended any manufacture of any part of the 142,000 magazines prior to its letter of February, but after completing the 298,000 and being paid therefor in full, the plaintiff did not at any time ask to be allowed to make or deliver the balance of the magazines. It desired, for manifest reasons, to close the matter on its books, and it asked for a corrected suspension order looking to that end. Its entire action showed not only a willingness, but a purpose, to accept the modified order and to acquiesce therein. It must be held to have agreed to the modification of the contract to the extent, at
39 least, that it would not expect to manufacture or insist upon a right to manufacture and deliver the 142,000 magazines. Having thus accepted the modification of the contract, it can not recover the prospective profits now claimed. The right to recover prospective profits involves a breach by one party of the contract, while there is a readiness and willingness of the other party to perform; but where it is agreed that there shall be a partial performance, manifestly there can be no recovery of the profits that would have been earned if the performance had been complete.

It is elementary; we need not cite authorities to sustain the proposition that where a contractor under obligation to furnish a stated quantity of article finds his contract canceled and subsequently negotiates for the delivery and acceptance of a less quantity than originally intended, accepts payment therefor and a modification order in accord with the agreement he can not then assert a claim for the undelivered balance. The position of the parties has been materially changed. The contractor must stand upon his legal rights under the original cancellation order; he can not abandon them and enter upon the performance of the agreement in accord with the accepted changes, and at the same time assert the binding force of the original contract. Two avenues of redress were open to the contractor in the first instance, and the right of election was his. He might choose the course which in the end entailed the least loss, and induce the other party to accept a part performance in lieu of a total or partial breach, or he might treat the contract as at an end and sue for damages. He can not accept one remedy without losing the other.

On September 24, 1919, for the first time, we find a written reservation of the plaintiff's alleged claim for prospective profits on the 112,000 magazines undelivered.—It at once arouses an extremely pertinent inquiry. Why this belated assertion of a claim which in all the correspondence between the parties—set forth in the finding—is not once reserved or treated in any other fashion than an unconditional surrender? We would dislike to indulge the inference that during this long period of time this particular claim was employed as a potent instrumentality to extract from the defendant a settlement advantageous to the plaintiff's securing a final and complete adjustment of its business transactions with the defendant under its contract, and after having served its purpose in this respect appear again as an assertion of a separate and distinct liability. The officers of the defendant, beyond the peradventure of a doubt, believed and treated it as settled in the agreement made. The correspondence of the plaintiff, in every letter and in every request, expressly mentioned its existence and agreed expressly to accept the suspension notice for 142,000 magazines without qualification or reservation. As late as August 20, 1919, the plaintiff wrote the defendant to this effect, as set forth in Finding IV.

Language so exact and often repeated is not susceptible to doubt and misunderstanding. The plaintiff had many and very extensive contracts with the defendant. It must have known the effect of its correspondence and the words it used.

The president of the plaintiff company was evidently not familiar with the negotiations between the company and the defendant, prior to September 12, 1919. On September 24 he acknowledged
40 in writing the receipt of the modified suspension order and very innocently inquired as to whether the Rochester District Claims Board had jurisdiction to settle and pay a claim for prospective profits, a question which had long since been answered by the board to the company's accredited representative and about which no one actively connected with the transaction had the slightest doubt.

The board on September 26, 1919, promptly notified the plaintiff that it had no jurisdiction of a claim for prospective profits, in answer to which the president of the company manifested an entire unfamiliarity with the transaction, for he therein stated that the plaintiff had offered verbally to accept the notice of cancellation of the contract C. M. G. 48-A on the basis of payment of anticipated profits thereon. The record is directly contrary to this assertion. No claim for anticipated profits on the 142,000 magazines was ever filed with any department of the Government, at any time, by any person, and the only verbal conversations shown by the record with reference thereto, except the talk with Colonel Crane, was the inclusion of all outstanding claims in the agreement made between the plaintiff and Colonel Horton. The only reason we can ascribe for the three last inquiries addressed to the board is an utter lack of knowledge of what had taken place. The plaintiff never attempted to deliver the 142,000 magazines; on the contrary, it is expressly asserted that their manufacture was suspended prior to February 13, 1919. The contract had already been formally canceled, and many months before formally suspended. The plaintiff's dealings with the Rochester District Claims Board had but recently been formally closed; it knew from a long course of daily contact with the board the extent of its authority and the detail of procedure, and the utter absurdity of repeating a situation which had been the subject of controversy for nearly ten months may be explained on the basis that the official of the plaintiff indulging the same was not fully informed with respect thereto. Otherwise we would be forced into the conclusion that the whole subject matter of the correspondence was intentionally delayed until the plaintiff had escaped all danger of controversy and trouble over its prior transactions, or was an afterthought upon which the company might hazard a claim for a large sum of money.

The petition will be dismissed. It is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Campbell, Chief Justice, concur.

41

IV. Judgment of the Court.

At a Court of Claims held in the City of Washington on the 15th day of May, A. D. 1922, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that the Savage Arms Corporation, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed; And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the Savage Arms Corporation, as aforesaid, the sum of Five hundred and thirty-four dollars and ninety cents (\$534.90), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

V. Plaintiff's Application for and Allowance of Appeal.

From the judgment rendered in the above entitled cause on the fifteenth day of May, 1922, in favor of the defendant, claimant by its attorney on June twenty-ninth, 1922, makes application for and gives notice of an appeal to the Supreme Court of the United States.

JESSE C. ADKINS,
Attorney for the Claimant.

JOHN H. ISELIN,
FRANK F. NESBIT,
Of Counsel.

Filed June 29, 1922.

Ordered: That the above appeal be allowed as prayed for.
June 29, 1922. .

By THE COURT.

42

Court of Claims.

No. 34234.

SAVAGE ARMS CORPORATION

VS.

THE UNITED STATES

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and Opinion of the Court by Booth, J.; of the judgment of the Court; of the plaintiff's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this First day of July, A. D. 1922.

[Seal of the Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 29,027. Court of Claims. Term No. 477. Savage Arms Corporation, appellant, vs. The United States. Filed July 10th, 1922. File No. 29,027.

(6983)